BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN HENNING Claimant VS. **MORTON SALT** Respondent AND **TRAVELERS PROPERTY CASUALTY CO. OF AMERICA** Insurance Carrier	)	Docket No. 1,049,403

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 26, 2010, Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore. Melinda G. Young, of Hutchinson, Kansas, appeared for claimant. Sylvia B. Penner, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to establish that his accidental injuries suffered January 21, 2010, "arose out of the duties, nature, condition, obligations and incidents of his employment."[1] Accordingly, the ALJ denied claimant's request for preliminary benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 8, 2010, Preliminary Hearing and the exhibits; the transcript of the deposition of Shane Bridges taken April 6, 2010; and the transcripts of the depositions of Perry Simpson, Carol Ann Boyd, Gabriel Staley, Neil Anibal and Jeremy Seachris, all taken April 13, 2010, together with the pleadings contained in the administrative file.

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[1] ALJ's Preliminary Hearing Order (April 26, 2010) at 8.

ISSUES

Claimant argues that he fell and was injured at work for reasons unknown and that his accident is therefore compensable. In the alternative, claimant contends his work activities contributed to his fall. He argues his fall was caused by: (1) lightheadedness from fumes or other work conditions, (2) lightheadedness from standing up too quickly from his position on the floor, (3) slipping on salt dust on the floor, or (4) an unknown cause that was not a personal risk. In the event the Board finds that claimant suffered from a preexisting personal condition that caused his fall, he argues that the close proximity of the conveyor belt or beam made it more likely that he hit his head when falling between the two structures.

Respondent argues that claimant fell as a result of a personal condition and, further, that there was no credible evidence to support the contention that claimant's employment caused or contributed to his injuries. Respondent, therefore, asks the Board to affirm the Preliminary Hearing Order of the ALJ.

The issue for the Board's review is: Did claimant's personal injury by accident arise out of his employment with respondent?

FINDINGS OF FACT

Claimant testified that he began working for respondent in April 1999 and has worked as a lead man on the carton line since August 2009. He worked the midnight to 8:30 a.m. shift. On January 21, 2010, claimant went to lunch at 4 a.m. He remembers returning to his machine at 4:30 a.m., but he does not remember anything that occurred that morning after that point. He was told that he fell, but he does not know of anyone who witnessed his fall He was taken to the Hutchinson Hospital by ambulance and from there was transferred to a hospital in Wichita, where he was a patient four to five days.

Claimant was having problems with lightheadedness and headaches for a month and a half to two months before the accident. Claimant suggested carbon monoxide as a possible explanation for his lightheadedness at work. He said he had not experienced the lightheadedness when he was at home. He said that his lightheadedness coincided with fumes from a forklift. Over the course of an 8-hour day, he estimated that he would spend 1 1/2 to 2 hours a day on a forklift and that there would be six to eight forklifts operating at any one time.

Claimant was under the care of Dr. Karl Radke, in part for the lightheadedness and in part for abdominal pain. He has not spoken with Dr. Radke about his concerns with carbon monoxide exposure and does not know if his blood work shows he had elevated levels of carbon monoxide in his system. Claimant said he did not remember losing consciousness before January 21, 2010. But he said one time he was going up some stairs at work and felt lightheaded, and he had to sit down at the top of the stairs. Dr.

Radke's office note of January 14, 2010, indicates that claimant had a syncopal episode at work the day before, and claimant said he probably was referring to the stair incident.

Claimant's medical records show that he indicated to the medical personnel that he had a headache before leaving for work the evening before his fall. He reported taking Tylenol for the headache. Claimant also said he had a cold. The hospital records indicate that claimant reported having a headache and dizziness symptoms for approximately 24 hours before his fall.

At about 6 a.m. on January 21, 2010, one of claimant's coworkers, Carol Boyd, noticed that claimant was sitting or lying on the floor replacing tape in a tape dispenser. Ms. Boyd asked him a question, and claimant got up quickly and started walking toward her. She said that claimant wobbled a little bit. She then turned back to her work but could see him out of the corner of her eye. She heard claimant fall and turned back around, and he was on the floor, lying on his back. Ms. Boyd did not see him fall, nor did she know if he hit his head on anything before he fell. Ms. Boyd went to check on him, found that he was unconscious and had blood dripping from his ear[2], and ran to the office for help. Gabriel Staley, Perry Simpson and Jeremy Seachris were all in the office when Ms. Boyd rushed in.

Ms. Boyd said that the floor where claimant fell was wood. She said that at times, salt will fall on the floor, and when that occurs one needs to be careful as the salt dust would make the floor slick. However, Ms. Boyd could not remember whether claimant was lying in dust, and she did not know if he slipped and fell. She also did not know if he hit his head and fell or if he collapsed and fell and hit his head. She believes that claimant's head had to have hit something based on the amount of blood on the floor, and if claimant hit his head, it would have been on a beam or an iron railing that is part of the conveyor belt. She said claimant's head was close in proximity to a hard plastic knob on the railing. However, she said that she and others looked for blood later and did not find any other than on the floor where claimant's head had been.

Ms. Boyd stated that she had at one time felt lightheaded while in the plant. However, that was during a time when the floors were being re-done and there were a lot of fumes. She did not notice any more fumes than normal in the area she was working on the day of claimant's incident. She said that the area where she and claimant work is on the second floor, and the fumes are downstairs.

Mr. Seachris testified that claimant was on his stomach when he first saw him. He further testified that there was blood on the floor by claimant's head, as well as blood coming from claimant's right ear. He said that claimant was lying close to both the railing

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[2] Ms. Boyd could not say whether she noticed the blood coming from claimant's right or left ear. Other testimony has identified the ear that was bleeding as claimant's right ear.

of the conveyor and to a structural I-beam. Mr. Seachris looked at the I-beam and the conveyor equipment and did not see anything that would indicate claimant hit either before falling.

Mr. Simpson, one of claimant's coworkers, testified that when he got to the scene of claimant's fall, claimant was unconscious and lying on his stomach on the floor. Claimant's head was about 10 to 12 inches away from a steel I-beam. There was blood in claimant's mouth and coming out of claimant's right ear. There was also a gash behind claimant's ear, but it was not bleeding. Mr. Simpson testified that he had never experienced being lightheaded at work and is not aware of any other employee who has experienced lightheadedness at work.

Mr. Staley, claimant's supervisor, testified that claimant was on his back when he arrived at the scene of the fall. He said claimant was breathing but he could not find a pulse. Mr. Staley testified that because claimant appeared to be choking, he and Mr. Simpson, who is an EMT, rolled claimant over to his side, which seemed to help. Mr. Staley said that claimant was lying between the beam and the knobs that are part of the railing. His head was about a foot away from each. Mr. Staley also testified that while he was writing up his report about the incident, he was told by one of claimant's coworkers, Ed Miller, that claimant had fallen the day before. Mr. Miller said that claimant just fell to the floor, then woke up and continued working.

Neil Anibal, another of respondent's employees, was working downstairs on the morning that claimant fell. Someone told him that claimant had fallen, so he hurried upstairs. Mr. Anibal said that claimant was lying on his stomach on the floor and was throwing up. There was blood on the side of his head. Mr. Anibal said claimant was lying about a foot away from a railing that had evenly-spaced knobs. He did not know if claimant had been moved before he arrived on the scene.

Mr. Anibal said that claimant had been complaining about headaches and chest pain for three or four weeks before his fall. Mr. Anibal said that although he had not been affected by fumes at the plant, at one time or another some other people had. He said he knew what carbon monoxide poisoning felt like, because he had experienced it at a different plant. Mr. Anibal said he did not notice anything unusual on the day claimant fell in regard to fumes. He said the plant has a ventilation system that blows air from the top of the third floor into the second floor.

Shane Bridges works for respondent, although he was not working at the time of claimant's fall. Mr. Bridges said he spends the majority of his eight-hour shift driving a forklift. He testified that seven years ago, he "got supposedly carbon monoxide poisoning."[3] He said he was dizzy and had a headache. He was taken outside to get

[3] Bridges Depo. at 7.

some air and about 10 to 15 minutes later went back into the plant. Since then, he has had headaches on and off, which he attributes more to stress than anything else. He also has had some dizziness, for which he has no explanation. Mr. Bridges said recently respondent modified his job because of his symptoms of dizziness and headaches. Also, Mr. Bridges sought medical treatment for his symptoms from his family doctor, who prescribed a muscle relaxer and headache medication. Mr. Bridges said the medication helped with his symptoms, and they have completely resolved.

Mr. Bridges said that he has reported to respondent at least three times that he believed something at the plant needed to be tested. He said he knows respondent tests for carbon monoxide and other environmental hazards. The last time Mr. Bridges complained was about a year ago when the fumes in the plant were strong because respondent had backed a train into the rail dock and then closed the doors. Mr. Bridges said that respondent responded by opening the doors and making the train pull outside.

Mr. Bridges said he is aware of other employees who have complained of similar symptoms as he had experienced. He said none of those employees had complained of fainting or told him they had passed out. He did not identify any of those employees.

Karl Farris is respondent's safety and industrial hygiene manager. One of his duties is to test carbon monoxide levels. The tests are performed annually, generally during the cooler months. Levels were last tested in December 2009. Mr. Farris said that OSHA's Potential Exposure Limit is a time-weighted average of 50 parts per million, and the highest level found at respondent was 18.33, and that was found on a full-time forklift operator. Mr. Farris testified that some time after January 21, he and Mr. Bridges were discussing claimant's fall, and Mr. Bridges said he had not been feeling well. But Mr. Bridges also said he was prone to tension headaches. No other employees have reported dizziness or headaches at work.

Mr. Farris said at times, rail cars will be pulled into the facility to be loaded. During those times, the doors are typically left open. Mr. Farris said that although diesel stinks, he had not been concerned because diesel engines, by their nature, do not cause problems with carbon monoxide.

After claimant's accident, Mr. Farris spoke with some of his coworkers. No one actually witnessed the incident, although Ms. Boyd said she saw claimant walking toward her in her peripheral vision. Mr. Farris said there is a building column or beam in the area where claimant was walking. However, Mr. Farris found no blood on the beam.

Claimant testified that he has not worked since the fall on January 21, 2010. He continues to experience problems with dizziness, saying he is dizzy all the time. He also suffered some hearing loss in the fall, although his doctor seems to think the hearing loss is temporary.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

In *Hensley*[7], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to 1 Larson's *Workmen's Compensation Law*, Sec. 7.04 (2006), the majority of jurisdictions compensate workers who are injured in unexplained falls upon the

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[4] K.S.A. 2009 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.

In *McCready*,[8] the Kansas Court of Appeals stated: "The employer bears the costs of neutral risks. Unexplained falls at work are neutral risks."

K.S.A. 2009 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

In *Martin,*[9] the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

In *Bennett*,[10] the claimant suffered an epileptic seizure while driving a motor vehicle for his employer and struck a tree. The Court of Appeals found:

> Where the injury is clearly attributable to a personal condition of the employee, and no other factors intervene to cause or contribute to the injury, no compensation award is allowed; but where the injury is the result of the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.[11]

In the Kansas Supreme Court case of *Cox*,[12] claimant had an epileptic seizure at work and, after becoming unconscious, fell against some hot pipes and severely injured his back. The Supreme Court denied compensation holding that:

> [T]he accident which caused plaintiff's injury flowed from his epileptic seizure, and that this particular recurrence of periodic malady from which plaintiff had suffered

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[8] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 81, 200 P.3d 479 (2009).

[9] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

[10] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992)

[11] *Id.*, 16 Kan. App. 2d 458, Syl. ¶ 2.

[12] *Cox v. Refining Co.*, 108 Kan. 320, 195 Pac. 863 (1921).

> for so many years was not provoked by his employment, nor did his employment contribute in any degree to bring on such epileptic seizure.[13]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[15]

ANALYSIS

Respondent does not dispute that claimant fell and was injured at work while performing his regular job duties. As such, respondent admits that claimant's accident occurred in the course of his employment.[16] The dispute is whether claimant's accident and resulting injury arose out of his employment.

Claimant contends that the cause of his fall is unknown and is, therefore, compensable. Where the cause of a fall at work is truly unknown, it is compensable under workers compensation. However, claimant said that he felt lightheaded and dizzy before he fell. Claimant had experienced these symptoms before both at work and away from work. The ALJ was persuaded by this evidence to conclude that claimant fell due to a preexisting condition and thus a personal risk. This Board Member agrees with that conclusion.

In the alternative, claimant contends his lightheadedness was from forklift fumes. But claimant was not working around forklifts when he fell. In fact, he was not on the same floor as where the forklifts were being operated when he fell. And although claimant denied that he had experienced lightheadedness away from work, the medical records show otherwise.

Finally, there is no evidence that claimant slipped on anything or that he struck his head before hitting the floor. The close proximity of a beam and a conveyor belt are not alone sufficient to show that they constituted a particular risk or hazard that caused or

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[13] *Id.* at 327.

[14] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[15] K.S.A. 2009 Supp. 44-555c(k).

[16] Respondent's Brief at 6-7 (filed June 14, 2010).

contributed to his injuries. Based on the record presented to date, this Board Member finds that the ALJ's Order should be affirmed.

CONCLUSION

Claimant has failed to meet his burden of proving that his fall at work and resulting injuries arose out of his employment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 26, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge